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No. 92-68

Supreme Court, U.S.
FILED
JUL 8 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

STONECRAFTERS, LTD. AND JOHN W. KRONBERG,

Petitioners,

v.

NORWEST EQUIPMENT FINANCE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

DID THE FAILURE OF THE CONNECTICUT SUPREME COURT TO COMPEL THE RESPONDENT TO COMPLY WITH THE PROVISIONS OF THE CONNECTICUT REPLEVIN STATUTES C.G.S. §52-515 ET SEQ. AND THE CONNECTICUT PREJUDGMENT REMEDY STATUTES C.G.S. §52-278a ET SEQ. VIOLATE THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE THE CLEAR RESULT IS THE DECISION OF A FEDERAL QUESTION IN CONFLICT WITH THE OPINION OF THE UNITED STATES SUPREME COURT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STONECRAFTERS, LTD.
JOHN W. KRONBERG

Petitioners

V.

NORWEST EQUIPMENT FINANCE, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioners Stonecrafters, Ltd. and John W. Kronberg respectfully pray that a writ of certiorari issue to review a decision of the Connecticut Supreme Court entered on April 9, 1992 denying review of a Connecticut Appellate Court decision dated

March 3, 1992.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 211 Conn. 926, ___ A.2d ___ (1992) and is printed in Appendix A, infra, page 1A. The opinion of the Connecticut Appellate Court is reported at 26 Conn. App. 946, ___ A.2d ___ (1992) and is printed in Appendix B, infra, page 2A. The trial court (Schaller, J) granted the prejudgment remedy for replevin on August 13, 1991, in the Superior Court, judicial district of New Haven at New Haven, CV 91 0317554S.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut, Appendix A, infra, page 1A, was entered on April 9, 1992. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

I. DID THE FAILURE OF THE CONNECTICUT SUPREME COURT TO COMPEL THE RESPONDENT TO COMPLY WITH THE PROVISIONS OF THE CONNECTICUT REPLEVIN STATUTES C.G.S. §52-515 ET SEQ. AND THE CONNECTICUT PREJUDGMENT REMEDY STATUTES C.G.S. §52-278a ET SEQ. VIOLATE THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE THE CLEAR RESULT IS THE DECISION OF A FEDERAL QUESTION IN CONFLICT WITH THE OPINION OF THE UNITED STATES SUPREME COURT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, §1

The Connecticut replevin statutes are as follows:

C.G.S. §52-515 through §52-530

The Connecticut prejudgment remedy statutes are as follows:

C.G.S. §52-278a through §52-278n

STATEMENT OF THE CASE

On June 14, 1991 respondent Norwest Equipment Finance, Inc. filed an application for prejudgment remedy (under C.G.S. §§52-278a through §52-278f) seeking replevin under (C.G.S. §§52-515 through §52-530) of a large piece of equipment known as an "ACCU-CUT TB 24-10". Said piece of equipment is used for cutting stone, its dimensions are approximately that of a two car garage and its foundation is poured in concrete and is otherwise permanently affixed to the real property.

The application for prejudgment remedy for replevin was granted on July 29, 1991. On July 30, 1991 defendant petitioners filed a motion to dissolve the prejudgment remedy and further, on August 12, 1991 filed a motion to dismiss the application for prejudgment remedy in replevin. Petitioners' central argument in those motions was that

respondent failed to comply with the Connecticut replevin statute in that plaintiff respondent's complaint did not state who was the title holder of the property to be replevied pursuant to C.G.S. §52-525, and thus, absent this information, petitioners were foreclosed from having the opportunity of presenting a meaningful defense in accord with C.G.S. §52-525. On August 13, 1991, the state trial court granted the prejudgment remedy for replevin and the defendant petitioners appealed. On March 3, 1992 the Connecticut appellate court affirmed the trial court's decision without written opinion and the defendant petitioners applied for certification to the Supreme Court of the state of Connecticut. On April 9, 1992, the Connecticut Supreme Court denied defendant petitioners' application for certification to review said Appellate Court decision. On May 18, 1992 the Appellate

Court granted defendant petitioners' motion for stay of the replevin order so that petitioners could present their petition for writ of certiorari to this Court.

REASON FOR GRANTING THE WRIT

The Supreme Court of the State of Connecticut has upheld a state trial court's unconstitutional application of the provisions of the state replevin statutes and the state prejudgment remedy statutes to the facts of this case, depriving the petitioners of their due process rights under the U.S. Const. Amendment XIV, Section 1, even though the United States Supreme Court has previously addressed the issue of due process in cases of property deprivation; i.e., prejudgment attachment or similar proceeding.

The Connecticut courts have decided the federal question of the petitioners' due process rights under Connecticut General

Statutes, §52-515 et seq. and §52-278a et seq. in a way in conflict with applicable decisions of this Court.

The petitioners herein respectfully request that this Court issue a writ of certiorari for the following reasons.

This Court's decisions in replevin cases have time and again reflected the Court's acknowledgement that procedural due process must be strictly complied with in the framework of a replevin proceeding.

As this Court held in *Fuentes v. Shevin*, 92 S. Ct. 1983, 1994 (1972):

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment - to minimize substantively unfair or mistaken deprivations of property, a danger that is espe-

> cially great when the state seizes goods simply upon the application of and for the benefit of a private party so viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a persons right to enjoy what is his, free of government interference." (emphasis added) at 1994.

The Supreme Court of the state of Connecticut in the case, *Shawmut Bank N.A. v. Valley Farm, et al*, 222 Conn. 361, 370-371 (1992), readily concedes that in the context of a replevin case, compliance with the demands of due process are essential. "General Statutes §§52-278a through 52-278h were 'enacted in response to the constitutional instructions of *Fuentes v. Shevin* [supra] and *Sniadach v. Family Finance Corporation*, 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969) (other citing omitted). Thus, in order to obtain an order of replevin, the plaintiff respondent was

required to satisfy not only the requirements of the replevin statutes, General Statutes §52-515 et seq., but the requirements of due process as expressed in §§52-278a through 52-278h."

In *Shawmut Bank N.A. v. Valley Farm, et al*, supra, the movants asked the Connecticut Supreme Court to find the entire Connecticut replevin statute unconstitutional. *Shawmut Bank N.A. v. Valley Farm, et al*, supra at 367. In rendering a decision, Judge Borden observed that the issue was not whether or not the Connecticut replevin statutes were unconstitutional on their face (because they *were* unconstitutional, *Shawmut Bank N.A. v. Valley Farm, et al*, supra at p. 372)[1] but whether or not the statute

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[1] "It is true, as the defendants argue, that §52-521, as drafted, ordinarily contemplates a challenge to the bond after the seizure. That does not mean, however, that it is not subject to a construction, in order to save its constitutionality, that

had been constitutionally applied under the facts of the particular case held that in order to determine whether a statute has been constitutionally applied, the specific facts of the case must be reviewed. "This well established principle is consistent with equally well established principles that 'due process is flexible and calls for such procedural protections as the particular situation demands." *Shawmut Bank v. Valley Farm*, supra at 368-369. (other citations omitted) Ultimately, Judge Borden found that "[w]e therefore view the question of the constitutionality of the statute at issue as applied under the facts of this case." *Shawmut v. Valley Farms* supra at 369.

This Court has also examined "what process

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would require an opportunity by the defendant to challenge the amount and form of the bond prior to the seizure of the property." *Shawmut Bank, N.A. v. Valley Farms*, 222 Conn. 361, 372.

must be afforded by a state statute enabling an individual to enlist the aid of the state to deprive another of his or her property by means of the prejudgment attachment or similar procedure" in *Connecticut v. Doehr*, 111 S. Ct. 2105, 2111. This Court determined that a threefold inquiry is required when considering what process is due when, in the context of a prejudgment remedy, the government itself seeks to effect a deprivation of its own initiative. That initiative includes consideration of:

> "[1] ...consideration of the private interest that will be affected by the prejudgment measure;
>
> [2] second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards and third...
>
> [3] principal attention to the interest of the party seeking the prejudgment remedy with, nonetheless due regard for any ancillary interest the government may have

> in providing the procedure or forgoing the added burden of providing greater protections." *Connecticut v. Doehr*, supra at 2112.

Ultimately, the *Doehr* Court held that due process is an essential ingredient in any state prejudgment statute that condones a taking. "Without doubt, state procedures for creating and enforcing attachments, as with liens 'are subject to the strictures of due process.'" *Connecticut v. Doehr*, supra at 2113 citing *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85, 108 S. Ct. 896, 899, 99 L.Ed.2d 75 (1988).

In the instant action by not requiring the plaintiff respondent to comply with an essential aspect of the replevying statute, the Connecticut trial court and appellate court have proceeded in contravention of the mandates of *Connecticut v. Doehr* and of the state and federal constitutions. By allowing the

plaintiff respondent to proceed without a determination of title, the trial court could never determine what the "private interest" was that was to be protected since it was not plead or proved. Ultimately, number one of the threefold inquiry of the *Doehr* analysis could never be reached because a hearing on the "property interest" was foreclosed by the Connecticut trial and appellate courts who allowed the case to proceed even though the plaintiff respondent had not complied with the statute. This occurred despite the fact that two Uniform Commercial Code security interests were attached to the complaint. One in favor of the plaintiff and one in favor of the manufacturer, Park Industries.

As defendant petitioners have argued to the trial and the appellate courts, defendant petitioners' rights to due process were violated because plaintiff respondent did *not*

comply with the dictates of the replevin statutes. Central to the Connecticut replevin scheme is that the movant must provide a sufficient statement of title in the complaint unless the right of action rests upon a right of possession by virtue of a special property interest. C.G.S. §52-525(a). In this action, plaintiff respondent's complaint *did not state* who owned the stone cutter sought to be replevied or if the right of action rested upon a right of possession by virtue of a special property interest as required by C.G.S. §52-525. The complaint merely describes the plaintiff respondent's interest in the property as a "security interest in an ACCU-CUT TB 24-10" stone cutter, by virtue of a security agreement." Thus, said pleading does not comply with C.G.S. §52-525(b) in that it does not set forth the facts upon which the purported

special property interest depends. A lease is not a source of title and/or special property interest as to the lessor.

The due process injury to defendant petitioners which results from plaintiff respondent's failure to comply with the statute is that defendant petitioners were foreclosed from presenting a defense on the issue of the merits of plaintiff respondent's title and/or the issue of the plaintiff respondent's lack of right to immediate possession. Said lack of notice in plaintiff respondent's complaint prevented the defendant petitioners from exercising their due process rights attendant to notice and opportunity to be heard on the issue of lack of title and/or special interest which is the principal statutorily defined defense allowed under the Connecticut replevin statutes.

CONCLUSION

Using the framework for analysis as pro-

vided in *Doehr v. Connecticut*, supra and *Shawmut Bank v. Valley Farms*, supra it is clear that defendant petitioners' state and federal constitutional rights have been violated. Clearly, in the context of a government sanctioned taking such as replevin, due process rights must be vigorously protected; and, if after analyzing the facts of the case it is determined that the taking did not in fact comport with due process, the taking must be found to be faulty. In this case, plaintiff respondent did not comply with those aspects of the replevin statute which were specifically drafted to protect due process rights, as was specifically mandated by this court in *Fuentes v. Shevin*, supra, and *Sniadach v. Family Finance Corporation*, supra. As the facts of this case clearly show, the trial court and the appellate court allowed the plaintiff respondent to

proceed without complying with the replevin statute.[2] Thus, under the factual scenario of this particular case, the statute has not been applied constitutionally, and defendant petitioners' state and federal rights have been violated. Plainly, the trial court and appellate courts of the state of Connecticut cannot be permitted to sanction proceedings which violate their own state statutes as

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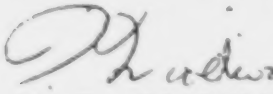
[2] A replevin proceeding in the state of Connecticut is purely statutory. *Ford Motor Credit Co. v. B.W. Beardsley, Inc.*, 208 Conn. 13, 17 (1988). The law governing the filing of a replevin action is found at C.G.S. §52-530. Any proceeding brought under this section must conform with the statutes. *M. Itzkowitz and Sons, Inc. v. Victor L. Santorelli*, 128 Conn. 195, 198 (1941).

Further, pursuant to C.G.S. §56-516(b) any writ of replevin brought in the nature of a prejudgment remedy must conform with the requirements of the prejudgment remedy statutes found at C.G.S. §52-278a through C.G.S. §52-278g. As with the replevin statute, a party may only proceed with an action under the prejudgment statute if all of the requirements of the statute are complied with. *Danmar Ass. et al v. Porter*, 43 BR 428, 431 (CC 1984).

well as violate the state and federal constitutions.

For all the reasons enumerated above, defendant petitioners pray this honorable court accept their petition for writ of certiorari.

RESPECTFULLY SUBMITTED,
STONECRAFTERS, LTD. &
JOHN KRONBERG



BY F. WOODWARD LEWIS, JR.
Attorney for Petitioners

No. _____

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APPENDIX

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NORWEST EQUIPMENT FINANCE, INC. *v.*
STONECRAFTERS, LTD., ET AL.

The defendants Stonecrafters, Ltd., and John W. Kronberg's petition for certification for appeal from the Appellate Court, 26 Conn. App. 946, is denied.

F. Woodward Lewis, Jr., in support of the petition.

Jonathan J. Einhorn, in opposition.

Decided April 9, 1992

NORWEST EQUIPMENT FINANCE, INC. *v.*
STONECRAFTERS, LTD., ET AL.
(10545)

DALY, O'CONNELL and FOTI, Js.

Argued February 18—decision released March 3, 1992

Application for a prejudgment remedy of replevin on certain of the defendants' business equipment, brought to the Superior Court in the judicial district of New Haven, where the court, *Schaller, J.*, granted the application, and the named defendant et al. appealed to this court. *Affirmed.*

F. Woodward Lewis, Jr., for the appellants (named defendant et al.).

Jonathan J. Einhorn, for the appellee (plaintiff).

PER CURIAM. The judgment is affirmed.

APPENDIX C

C.G.S. §52-515

WHEN ACTION OF REPLEVIN MAINTAINABLE

The action of replevin may be maintained to recover any goods or chattels in which the plaintiff has a general or special property interest with a right to immediate possession and which are wrongfully detained from him in any manner, together with the damages for such wrongful detention.

C.G.S. §52-516

COMMENCEMENT OF ACTION OF REPLEVIN. PREJUDGMENT REMEDY

(a) An action of replevin shall be commenced by a writ of summons or attachment, describing the parties, the court to which it is returnable and the time and place of appearance. The writ shall be signed as in other civil actions and may run into any judicial district.

(b) An action of replevin, to the extent that it includes a prejudgment remedy as defined in section 52-278a, shall not be allowed unless the provisions of sections 52-278a to 52-278f, inclusive, are complied with.

C.G.S. §52-517

REPLEVIN FOR PROPERTY ATTACHED

When any property is held by an officer by virtue of a writ of attachment, any person other than the defendant having a

general or special property interest therein with a right to the immediate possession thereof, and, when the property so held is claimed by the defendant may bring an action of replevin against the officer alone, or against the plaintiff in the writ of attachment, or against both, to recover the property.

C.G.S. §52-518

REPLEVIN WRIT; AFFIDAVIT AS TO VALUE OF GOODS AND RECOGNIZANCE REQUIRED

A writ of replevin shall not be issued: (1) Until the plaintiff, or some other credible person, subscribes an affidavit annexed to the writ stating the true and just value of the goods which it is desired to replevy, and that the affiant believes that the plaintiff is entitled to the immediate possession of the goods, and (2) until some person, known to the authority signing the writ to be of sufficient responsibility, has entered into a recognizance before him, with at least one sufficient surety, in a sum at least double the sworn value of the property, conditioned (A)that the plaintiff shall prosecute his action to effect, (B) for the payment of any judgment that may be recovered by the defendant in the action, and (C) for the return of the property to the defendant, and payment to the defendant of all damages sustained by the replevy of the recognizance shall be signed by the obligers in the presence of at least one witness other than the authority taking the recognizance. A record of the recognizance shall be entered at the foot of the writ before the writ is issued and copies of the

process left in service shall contain the affidavit and the recognizance.

C.G.S. §52-519

FORM OF WRIT, AFFIDAVIT AND BOND

The writ in an action of replevin, and the accompanying affidavit and recognizance, may be in the following form:

To any proper officer.

By authority of the state of Connecticut, you are hereby commanded, without delay, to cause to be replevied to A.B. of ..... certain goods and chattels, to wit: ..... of the value of (here inserted the value as stated in the affidavit) dollars, now in the possession of C.D. of ..... at ..... and wrongfully detained by him, and (to attach the goods or estate of C.D., to the value of ..... dollars and) him summon to appear before the superior court to be held at ..... within and for the judicial district of ..... on the ..... Tuesday of ....., 19...; then and there to answer to A.B., in a civil action, in which the plaintiff complains and says:

(Here follows complaint.)

Hereof fail not, but make due service and return.

Dated at ....., ... this ..... day of .... 19....

E.F., Commissioner of the Superior Court

Judicial district of ..... ss. Town of ..... 19...

J.S., of ....., being duly sworn, deposes and says that he believes that A.B. of ..... is entitled to

the immediate possession of the following described goods and chattels, namely: .....; that the deponent knows the nature and value of said goods and chattels, and that their true and just value, as nearly as the deponent can estimate it, is ..... dollars.

J.S.

Subscribed and sworn to before me,
E.F., Commissioner of the Superior Court

Be it remembered that at the town of ..... in ..... judicial district, on the ..... day of ..... 19...., there personally appeared before me, A.B. of ....., as principal, and I.J. of ....., and surety, both of whom are known to be of sufficient responsibility, and acknowledge themselves jointly and severally bound to C.D. of ....., in a recognizance in the sum of ..... dollars, that A.B of ..... who brought the foregoing writ and complaint against C.D., shall prosecute his action to effect, and shall pay to C.D. any judgment that C.D. may recover in the action, and return to C.D. the goods and chattels that may be recovered under the writ, and pay to him all damages that he may sustain by the replevying thereof if A.B. shall fail to establish his right to the possession of the same in the action.

A.B.
I.J.

Signed by the obligers in the presence of X.Y.

Subscribed and taken before me, E.F.
Commissioner of the Superior Court

C.G.S. §52-520

REPEAL (1976, P.A. 76-436,
SS 670, EFF.JULY 1, 1978)

C.G.S. §52-521

REPLEVIN; SERVICE; NEW BOND;
VOIDING OF PROCESS

(a) The officer who replevies property shall leave a true and attested copy of the process with the defendant, or at his usual place of abode, within three days after the replevy, and shall retain the property replevied in his custody for twenty-four hours after leaving the copy, unless the defendant endorses on the writ that he is satisfied with the amount and sufficiency of the recognizance taken on issuing the writ.

(b) If the defendant is not satisfied with the recognizance, he may, at any time before the return day of the writ, cite the plaintiff or his attorney, or the officer serving the writ, if the property still remains in his custody, to appear at once before a judge of the superior court where the replevin was effected, to respond to a motion for a new bond. The judge may hear the motion and, at his discretion, order a new or further bond, conditioned like the recognizance taken on issue=in the writ, signed by the obligers, and delivered to the defendant, by whom it shall be transmitted to the court to which the writ was made returnable. If the order is made while the property replevied remains in the custody of the officer, he shall not deliver the property to the plaintiff until the bond is

given.

(c) If an order for a new bond is not complied with, or if the officer fails to leave with, or at the usual place of abode of, the defendant a true and attested copy of the writ, or to retain the property in his custody, as hereinbefore provided, the writ of replevin shall be null and void.

(d) If it appears to the court before which an action of replevin is pending that the replevin bond attached to the writ is insufficient, the court may, at its discretion, order a new or further replevin bond to be given by the plaintiff, conditioned like the recognizance taken on issuing the writ. If the plaintiff fails to comply with the order, he shall be nonsuited.

C.G.S. §52-522

PLEADINGS

In an action of replevin, no cause of action, except of replevin or for a conversion of the goods described in the writ of replevin, may be stated. The pleadings in such action shall conform to the requirements of pleadings in civil actions so far as such requirements may be consistent with the substantive rights secured by this chapter.

C.G.S. §52-523

COMPLAINT

If the complaint in an action of re-

plevin contains a sufficient statement of the plaintiff's title and right of possession, a general allegation that the defendant wrongfully took the goods shall be sufficient without setting forth the facts showing that the taking was wrongful. If the taking of the goods is not complained of, but the action is founded upon their wrongful detention, the complaint shall set forth the facts showing that the detention was wrongful.

C.G.S. §52-524

DEFENSES

All defenses to an action of replevin, other than those to the jurisdiction or in abatement, including avowry, alleging the defendant's right to take and hold the goods, and disclaimer, renouncing any interest in the goods, shall be made by answer or demurrer. Those defenses claiming that the taking is for a lawful cause shall be by way of answer alleging the special facts upon which they are based. If the defendant claims a return of the goods or damages, he shall make the claim by was of counterclaim.

C.G.S. §52-525

STATEMENT OF TITLE

(a) An allegation by either party that the party pleading or a third person was, at the time when the action of replevin was commenced, or at the time the goods were replevied, the owner of the goods, or that they were then his property, is a sufficient

statement of title unless the right of action or defense rests upon a right of possession by virtue of a special property interest.

(b) If the right of action or defense rests upon a right of possession by virtue of a special property interest, the pleading shall set forth the facts upon which the special property interest depends so as to show that, at the time when the action was commenced or the goods were replevied, as the case may be, the party pleading or the third person was entitled to the possession of the goods.

(c) The defendant may, by answer, defend on the ground that the third person was entitled to the possession of the goods without connecting himself with the latter's title.

C.G.S. §52-526

JUDGMENT

No judgment for a return of the goods or for damages may be given to a defendant under a mere denial of the acts complained of, nor may a judgment of return be rendered in favor of a defendant who has either filed a return of the goods replevied.

C.G.S. §52-527

REPEALED (1982, P.A. 82-160,SS 259.)

C.G.S. §52-528

PROCEDURE ON WITHDRAWAL OR NONSUIT OF PLAINTIFF

If the plaintiff, in any action of replevin, fails to appear or withdraws or is nonsuited, before or after issue is joined, the defendant may file an answer in the nature of an avowry alleging his right to take and hold the goods and a counterclaim stating the injury he has sustained and his claim for damages. Thereafter, the court shall render judgment for the defendant to recover such damages as he has sustained, and his costs, and for a return of the property replevied; except that, in any action where the plaintiff withdrew by mistake, the court shall reinstate the case as though it had not been withdrawn.

C.G.S. §52-529

BURDEN OF PROOF. EVIDENCE. DAMAGES AND COSTS

If the plaintiff's right to the possession of the property described in the writ of replevin is put in issue, without any disclaimer of title by the defendant, the plaintiff shall be bound to prove his right to possession, and may show the damages sustained by him by reason of the detention of the property by the defendant. If the defendant in his answer by way of counterclaim claims damages for the replevin, he may give evidence of the damages. Judgment, if for the plaintiff, whether upon default or trial, shall be for his damages and costs, and, if for the defendant, shall be

for are turn of the property and for his damages and costs.

C.G.S. §52-530

DAMAGES FOR PROPERTY NOT REPLEVIED.
NO COSTS AGAINST COMMON CARRIER

If any of the property described in the writ of replevin is not replevied, but the plaintiff proves a general or special property interest therein with a right to its immediate possession, and that the property is wrongfully detained by the defendant, and claims full damages therefor, the value of the property with damages for its detention may be included in any judgment which the plaintiff my recover. Any such value shall be stated upon the record, No costs may be taxed against a common carrier which is defendant in any action of replevin for recovery of goods, wares, merchandise, baggage or freight in its possession when such common carrier upon demand surrenders the property to the officer serving the writ and makes no defense to the action.

C.G.S. §52-531

NONRESIDENT DEFENDANT; SECURITY FOR COSTS

In an action of replevin brought against any person not an inhabitant of this state, the court before which the action is pending may make such order as to security to be given by the defendant for costs that may be recovered by the plaintiff as it deems just.

APPENDIX D

C.G.S. §52-278a

DEFINITIONS

The following terms, as used in sections 52-278a to 52-278g, inclusive, shall have the following meanings, unless a different meaning is clearly indicated from the context:

(a) "Commercial transaction" means a transaction which is not a consumer transaction.

(b) "Consumer transaction" means a transaction in which a natural person obligates himself to pay for goods sold or leased, services rendered or moneys loaned for a personal , family or household purposes.

(c) "Person" means and includes individuals, partnerships, associations and corporations.

(d) "Prejudgment remedy" means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment but shall not include a temporary restraining order.

(e) "Property" means any present or future interest in real or personal property, goods, chattels or chooses in action, whether such is vested or contingent.

C.G.S. §52-278b

AVAILABILITY OF PREJUDGMENT REMEDY

Notwithstanding any provision of the general statutes to the contrary, no prejudgment remedy shall be available to a person in any actin at law or equity (1) unless he has complied with the provisions of sections 52-278a to 52-278g, inclusive, except an action upon a commercial transaction wherein the defendant has executed a waiver as provided in section 52-278f, or (2) for the garnishment of earnings as defined in subdivision (5) of section 52-350a.

C.G.S. §52-278c

DOCUMENTS REQUIRED. FORMS. HEARING. TEMPORARY RESTRAINING ORDER. ENTRY FEE. SERVICE ON DEFENDANT.

(a) Except as provided in sections 52-278e and 52-278f,any person desiring to secure a prejudgment remedy shall attach his proposed unsigned writ, summons and complaint to the following documents:

(1) An application, directed to the superior court to which the action is made returnable, for the prejudgment remedy requested;

(2) An affidavit sworn to by the plaintiff or any competent affiant setting forth a statement of facts sufficient to show that there is probable cause that judgment will be rendered in the matter in favor of the plaintiff;

(3) A form of order that a hearing be held before the court or a judge thereof to determine whether or not the prejudgment remedy requested should be granted and that notice of such hearing be given to the defendant;

(4) A form of summons directed to a proper officer commanding him to serve upon the defendant at least four days prior to the date of the hearing, pursuant to the law pertaining to the manner of service of civil process, the application, a true and attested copy of the writ, summons and complaint, such affidavit and the order and notice of hearing;

(b) The application, order and summons shall be substantially in the form following:

APPLICATION FOR PREJUDGMENT REMEDY

To the Superior Court for the Judicial District of.....

The undersigned represents:

1. That ..... is about to commence an action against ..... (give name and address of defendant) pursuant to the attached proposed unsigned Writ, Summons, Complaint and Affidavit.

2. That there is probable cause that a judgment will be rendered in the matter in favor of the applicant and to secure the judgment the applicant seeks an order from this court directing that the following prejudgment remedy be issued to secure the sum of $.....:

a. To attach sufficient property of the defendant to secure such sum: b. To garnishee ....., as he is the agent,

trustee, debtor of the defendant and has concealed in his possession property of the defendant and is indebted to him.

c. (Other Type of Prejudgment Remedy Requested)

ORDER

The above application having been presented to the court, it is hereby ordered, that a hearing be held thereon on ..... at ..... a.m. and that the plaintiff give notice to the defendant of the pendency of the application and of the time when it will be heard by causing a true and attested copy of the application, the proposed unsigned writ, summons, complaint, affidavit and of this order to be served upon the defendant by some proper officer or indifferent person on or before....., and that due return of service be made to this court.

Dated at Hartford this .....day of ....., 19...

Clerk of the Court

SUMMONS

To the sheriff of the county of .....-.., his deputy, or either constable of the town of ....., in said county, Greeting:

By authority of the state of Connecticut, you are hereby commanded to serve a true and attested copy of the above application, unsigned proposed writ, summons, complaint, affidavit and order upon .....-....., of ....., by leaving the same in his hands or at his usual place of abode on or before .....

Hereof fail not but due service and

return make.

Dated at ..... this ..... day of ..... 19...

Commissioner of the Superior Court

(c) The clerk upon receipt of all such documents in duplicate, if he finds them to be n proper form, shall fix a date for the hearing on the application and sign the order of hearing and notice except that if the application includes a request for a temporary restraining order, the court or a judge of the court shall act on the application for the temporary restraining order, fix a date for the hearing on the prejudgment remedy and sign the order of hearing and notice, The entry fee shall be then collected and the duplicate original document shall be placed in the court file.

C.G.S. §52-278d

HEARING ON PREJUDGMENT REMEDY APPLICATION. DETERMINATION BY THE COURT. SERVICE OF PROCESS

(a) The defendant shall have the right to appear and be heard at the hearing. The hearing shall be limited to a determination of whether or not there is probable cause to sustain the validity of the plaintiff's claim. If the court, upon consideration of the facts before it, finds that the plaintiff has shown probable cause to sustain the validity of his claim, then the prejudgment remedy applied for shall be granted as requested or as modified by the court unless the prejudgment remedy or application for such prejudgment remedy was dismissed or withdrawn pursuant to the provisions of section 52-278j.

(b) The clerk, upon the granting of the application for prejudgment remedy, shall deliver to the applicant's attorney the proposed writ, summons and complaint for service of process. If the court does not grant the application for any reason, including the failure of the plaintiff to serve the defendant, only a summons and complaint may be issued and served. In either event, the plaintiff may alter the return date of the writ, summons and complaint or the summons and complaint, as the case may be. No additional entry fee shall be collected upon the return of such action to court unless the prejudgment remedy or application for such prejudgment remedy was dismissed or withdrawn pursuant to the provisions of section 52-278j

(c) If a prejudgment remedy is issued and the defendant moves the court for a stay, the court may, if it determines justice so requires, stay such order if the defendant posts a bond, with surety, in a sum determined by such judge to be sufficient to indemnify the adverse party for any damage which may accrue as a result of such stay.

C.G.S. §52-278e

ALLOWANCE OF PREJUDGMENT REMEDY WITHOUT HEARING. NOTICE TO DEFENDANT. SUBSEQUENT HEARING AND ORDER. ATTACHMENT OF REAL PROPERTY OF MUNICIPAL OFFICERS.

(a) The court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as

provided in sections 52-278c and 52-278d upon the fining of an affidavit sworn to by the plaintiff or any competent affiant setting forth a statement of facts sufficient to show that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property; or (2) that there is reasonable likelihood that the defendant (A) neither resides in nor maintains an office or place of business in this state and is not otherwise subjected to jurisdiction over his person by the court, or (B) has hidden or will hide himself so that process cannot be served on him or (C) is about to remove himself or his property from this state or (D) is about to fraudulently dispose of or has fraudulently disposed of any of his property with intent to hinder, delay or defraud his creditors or (E) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts or (F) has stated he is insolvent or has stated he is unable to pay his debts as they mature.

(b) If a prejudgment remedy is granted pursuant to this section, the plaintiff shall include in the process served on the defendant the following notice prepared by the plaintiff: You have rights specified in the Connecticut general statutes, including chapter 903a, which you may wish to exercise concerning this prejudgment remedy. These rights include: (1) The right to a hearing to object to the prejudgment remedy for lack of probable cause to sustain the claim; (2) the right to a hearing to request that the prejudgment remedy be modified, vacated or dismissed or that a bond be substituted; and

(3) the right to a hearing as to any portion of the property attached which you claim is exempt from execution.

(c) The defendant appearing in such action may move to dissolve or modify the prejudgment remedy granted pursuant to this section in which event the court shall proceed to hold a hearing and determine such motion not later than seven business days after its fining. If the court determines at such hearing requested by the defendant that there is probable cause to sustain the validity of the plaintiff's claim and, if the plaintiff has relied on a ground set forth in subdivision (2) of subsection (a) of this section, that there is probable cause to believe such ground exists, then the prejudgment remedy granted shall remain in effect. If the court determines there is no probable cause to sustain the plaintiff's claim or, if a ground set forth in subdivision (2) of subsection (a) of this section was relied on, to believe such ground exists, the prejudgment remedy shall be dissolved. An order shall be issued by the court setting forth the action it has taken.

(d) No prejudgment remedy for the attachment of real property of a municipal officer may be granted pursuant to this section in any civil action against such officer for an act or omission, not malicious, wanton, wilful or ultra vires, on the part of such officer while acting in the discharge of his duties where such officer would be protected and held harmless from financial loss and expense under the provisions of section 7-101a.

C.G.S. §52-278f

EFFECT OF WAIVER OF NOTICE AND HEARING IN COMMERCIAL TRANSACTIONS

In an action upon a commercial transaction, as defined in section 52-278a, wherein the defendant has waived his right to a notice and hearing under sections 52-278a to 52-278g, inclusive, the attorney for the plaintiff shall issue the writ for a prejudgment remedy without securing a court order provided that (1) the complaint shall set forth a copy of the waiver; (2) the plaintiff shall file an affidavit sworn to by the plaintiff or any competent affiant setting forth a statement of facts sufficient to show that there is probable cause to sustain the validity of the plaintiff's claim; and (3) the plaintiff shall include in the process served on the defendant a notice satisfying the requirements of subsection (b) of section 52-278e.

C.G.S. §52-278g

MOTION TO PRESERVE EXISTING PREJUDGMENT REMEDIES

A plaintiff who has secured a prejudgment remedy prior to May 30, 1973, may make a motion to the court in which such action is pending for a hearing as set forth in section 52-278d with notice thereof to the defendant or his attorney. If the court, upon consideration of the facts before it, finds that the plaintiff has shown probable cause to sustain the validity of his claim, such prejudgment remedy secured shall be effective from the date of such hearing and

an order to that effect shall be issued by the court. Any such prejudgment remedy which is not perfected on or before October 1, 1977, shall be void and of no effect.

C.G.S. §52-278h

APPLICATION FOR PREJUDGMENT REMEDY FILED BY THE PLAINTIFF

The provisions of this chapter shall apply to any application for prejudgment remedy filed by the plaintiff at any time after the institution of the action, and the forms and procedures provided therein shall be adapted accordingly.

C.G.S. §52-278i

ORDER FOR PREJUDGMENT REMEDY ON SET-OFF OR COUNTERCLAIM

Any defendant in any civil action, upon filing a set-off or counterclaim containing a claim for money damages, may, at any time during the pendency of such action, apply in writing to the court before which such action is pending, or, when such court is not in session, to any judge thereof, for an order for a prejudgment remedy against the estate of the party or parties against whom such claim has been made. Such application shall be substantially in the form provided by subsection (b) of section 52-278c adapted accordingly. A hearing on such motion shall be held in accordance with the provisions of section 52-278d, adapted accordingly, and if the court, upon consideration of the facts before it, finds that the defendant has

shown probable cause to sustain the validity of his claim, then the prejudgment remedy applied for shall be granted as requested or as modified by the court and the court shall issue such an order, directed to any proper officer, stating the amount and estate to be attached and the time of return, which order shall be served and returned in the same manner as an original writ of attachment, and when returned shall become a part of the files and records in the action. The estate attached shall be held to respond to the final judgment in the same manner as if it had been attached in an action originally brought for the recovery of the amount claimed in such set-off or counterclaim. The provisions of section 52-278e, except subparagraphs (A) and (B) of subdivision (2) thereof, and sections 52-278f and 52-278g, adapted accordingly, shall apply to any application for a prejudgment remedy sought under this section.

C.G.S. §52-278j

DISMISSAL OR WITHDRAWAL OF PREJUDGMENT REMEDY

(a) If an application for a prejudgment remedy is granted but the plaintiff, within thirty days thereof, does not serve and return to court the writ, summons and complaint for which the prejudgment remedy was allowed, the court shall dismiss the prejudgment remedy.

(b) If an application for a prejudgment remedy is denied and the plaintiff, within thirty days thereof, does not serve and return to court the writ of summons and

complaint for which the prejudgment remedy was requested, or if a date for a hearing upon a prejudgment remedy is scheduled by the clerk and such hearing is not commenced within thirty days thereof, except as provided in section 52-278e, the court shall order the application to be considered as having been withdrawn.

(c) An application for a prejudgment remedy or a prejudgment remedy which is granted but not served may be withdrawn in the same manner as a civil cause of action.

C.G.S. §52-278k

MODIFICATION OF PREJUDGMENT REMEDY

The court may, upon any application for prejudgment remedy under section 52-278, 52-278e, 52-278h or 52-278i, modify the prejudgment remedy requested as may be warranted by the circumstances. The court may, upon motion and after hearing, at any time modify or vacate any prejudgment remedy granted or issued under this chapter upon the presentation if evidence which would have justified such court in modifying or denying such prejudgment remedy under the standards applicable at an initial hearing.

C.G.S. §52-278l

APPEAL

(a) An order (1) granting or denying a prejudgment remedy following a hearing under section 52-278d or (2) granting or denying a motion to dissolve or modify a

prejudgment remedy under section 52-278e or (3) granting or denying a motion to preserve an existing prejudgment remedy under section 52-278g shall be deemed a final judgment for purposes of appeal.

(b) No such appeal shall be taken except within seven days of the rendering of the order from which the appeal is to be taken.

(c) No such order shall be stayed by the taking of an appeal except upon the order of the judge who made such order, and any such stay shall be granted only if the party taking the appeal posts a bond, with surety, in a sum determined by such judge to be sufficient to indemnify the adverse party for any damages which may accrue as a result of such stay.

(d) If a motion to discharge such prejudgment remedy is brought by the defendant, the property affected by such remedy may be restored to the use of the defendant, if the defendant posts a bond with surety in an amount determined by such judge to be sufficient to indemnify the plaintiff for any damages which may accrue by the defendant's continued use of such property, until such time as such motion is decided.

C.G.S. §52-278m

WHEN PERSONAL SERVICE NOT REQUIRED

Whenever a prejudgment remedy is sought under the provisions of sections 52-278h or 52-278i against a party who has previously filed a general appearance in such action,

personal service of any application or order upon such party shall not be required, unless ordered by the court, but any such application or order may be served in the same manner as any motion in such action.

C.G.S. §52-278n

MOTION TO DISCLOSE PROPERTY.
ORDER FOR DISCLOSURE.
SUBSTITUTION OF SURETY.

(a) The court may, on motion of a party, order an appearing defendant to disclose property in which he has an interest or debts owing to him sufficient to satisfy a prejudgment remedy. The existence, location and extent of the defendant's interest in such property or debts shall be subject to disclosure. The form and terms of disclosure shall be determined by the court.

(b) A motion to disclose pursuant to this section may be made by attaching it to the application for a prejudgment remedy or may be made at any time after the filing of the application.

(c) The court may order disclosure at any time prior to final judgment after it has determined that the party filing the motion for disclosure has, pursuant to section 52-278d, 52-278e or 52-278i, probable cause sufficient for the issuance of a prejudgment remedy.

(d) A defendant, in lieu of disclosing assets pursuant to subsection (a) of this section, may move the court for substitution

either of a bond with surety substantially in compliance with sections 52-307 and 52-308, or of other sufficient security.

(e) Rules of court shall be enacted to carry out the foregoing provisions and may provide for reasonable sanctions to enforce orders issued pursuant to this section.

Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

(2)

No. 92-0068

In The

Supreme Court of the United States

October Term, 1992

STONECRAFTERS, LTD. AND JOHN W. KRONBERG,

vs.

Petitioners,

NORWEST EQUIPMENT FINANCE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Upon the default of the defendants Stonecrafters, Ltd., John W. Kronberg and John A. Tomlinson on an equipment lease for an industrial stonecutter, the plaintiff lessor brought this replevin action in Connecticut Superior Court, seeking its return.

Pursuant to § 52-278a *et seq.*, Conn. Gen. Stat., such an action is begun by a prejudgment remedy. Contrary to the implications in petitioners' Statement of the Case, a fully contested hearing on this issue was held on August 12, 1991 After the hearing, with all parties present, and evidence taken, the court found in favor of the respondent, and the prejudgment remedy application for a replevin was granted, upon the posting of a bond with commercial surety in the amount of $60,000.

On the day of the hearing, the defendants filed a motion to dismiss claiming noncompliance with the replevin statutes, and that the bond set by the court was inadequate, which motion was denied. With regard to the amount of the bond, the court heard respondent's testimony as to the value of the stonecutter, and defendant's testimony as to alleged "damages" which would be suffered if the machine were replevied. The court chose to accept respondent's testimony and set the bond at $60,000; twice the value it found of the stonecutter.

The equipment in question is a large commercial stonecutter, which is attached to the floor and wired for use. No dispute was made by defendants that they were in default under the equipment lease and no expert testimony was offered by defendants to contradict respondent's valuation of the equipment.

After hearing witnesses for both respondent and defendants, the court found that the respondent had satisfied its standard of proof for prejudgment remedy applications, finding that there was probable cause to sustain the validity of respondent's claim.

Thereupon followed a host of appeals by defendants. The defendants appealed to the Connecticut Appellate Court, which on March 3, 1992 affirmed the trial court, without written opinion. The issue of the constitutionality of the replevin statute was not

raised in oral argument and only in a brief reference in a reply brief.

The defendants then petitioned for certification to the Connecticut Supreme Court, which denied certification on April 9, 1992 also without opinion.

Petitioners' argument throughout the hearing and the appeals has been essentially that the trial court reached an erroneous conclusion in finding probable cause to issue a prejudgment remedy, and in setting the amount of the bond. Petitioners have yet to raise any objection as to the procedural due process afforded them at the hearing. This was a case of disputed allegations as the title of the stonecutter, and the court determined that title belonged to the respondent. This appeal stems from petitioners' dissatisfaction with that factual result.

REASON FOR DENYING THE WRIT

Certiorari is not appropriate in this case.

Petitioners basically claim that certiorari should be granted, based upon this Court's due process requirements for prejudgment remedy applications in *Connecticut v. Doehr,* 111 S. Ct. 2105 (1991).

That case and its holding are wholly inapplicable to this appeal. *Doehr* held a former provision of Connecticut's prejudgment remedy statute unconstitutional, which allowed for an *ex parte* attachment of real estate. In that assault case, a real estate attachment was granted without a prior hearing or notice. That case concerned itself with procedural due process and found Connecticut's former pre-judgment remedy statute lacking. *Id.* at 2111. Such is absolutely not the case here.

Here, a full and contested hearing was held in open court at which the parties appeared, argued, presented evidence and called witnesses. There was nothing *ex parte* about the process. After the hearing, the court found probable cause to grant respondent a prejudgment remedy (by replevin), of a commercial stonecutter. Petitioners' only real complaint is that it was unsucessful.

Petitioners make no claim that the replevin statute (§ 52-515, Conn. Gen. Stat.) is unconstitutional, or that its procedures deprive it of due process. Petitioners' only claim is that the trial court erred in finding that the respondent complied with certain statutory requirements.

In its petition, pages 12 and 13, petitioners erroneously indicate that the court allowed the respondent to proceed without a determination of title. This is incorrect. The court heard evidence on whether or not respondent had title, but did not agree with petitioners' position. The issue was fully explored at trial.

In fact, at pages 13 and 14 of the petition, the petitioners recite the conflicting evidence of title of the stonecutter, which was presented to the court, and which contradicts its position that the court ignored the issue. It must also be noted that (a) petitioner never claimed it had title, only that a third party and not respondent held the same, a claim it was unable to prove; (b) this is a commercial transaction, not a consumer transaction; and (c) the petitioners never denied being in default under its lease to respondent.

The petitioners also misstate the holding of *Shawmut Bank, N.A. v. Valley Farms,* 222 Conn. 361 (1992). At page 9 of the petition, petitioners state:

In rendering a decision, Judge Borden observed

> that the issue was not whether or not the Connecticut replevin statutes were unconstitutional on their face (*because they were unconstitutional, Shawmut Bank N.A. v. Valley Farm, et al.*, supra at p. 372).

(Emphasis added).

Such a statement is incorrect. Nowhere in *Shawmut* does the court indicate that the Connecticut replevin statute is unconstitutional. If anything, *Shawmut* includes an excellent dissertation on why Connecticut's statute withstands any *Doehr* related challenge.

> This case is distinguishable from *Doehr*. Here, there was no ex parte deprivation. The replevin order did not issue until after the defendants had a full opportunity for an evidentiary hearing. Furthermore, unlike the situation in *Doehr*, in this case the probable cause standard was constitutionally sufficient because the facts at issue, namely the existence of the debt and whether it was in default, were "ordinarily uncomplicated matters that lend themselves to documentary proof." Id., 2114, quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974). Therefore, "the risk of error was minimal . . ." *Connecticut v. Doehr*, supra, 2115; see also *Union Trust Co. v. Heggelund*, supra. Finally, unlike the situtation in *Doehr*, where the (p)laintiff had no existing interest in (the defendant's) real estate when he sought the attachment, *Connecticut v. Doehr*, supra; in this case the plaintiff had a preexisting security interest in the property sought to be replevied.

A trial court making a finding of title contrary to the arguments of the petitioners does not raise constitutional issues. Petitioners' objections to the trial court's findings of fact have been fully litigated in state court.

CONCLUSION

This is clearly not a matter appropriate for review by this Court, and certiorari ought to be denied.

Respectfully submitted,

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